Yap Hong Too & Anor v Wong Ah Mei & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–745 OF 1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHD DZAIDDIN FCJJ
1 NOVEMBER 1996

Land Law *— Sale of land — Sale by order of court — Strict compliance with sale and purchase agreement — Time was of essence of contract — Contract provided that payment of purchase price must be made within seven days after receipt of order of court by purchaser — Vendor failed to send order of court to purchaser directly as provided in contract — Instead, order was sent to purchaser's solicitors — Such non-compliance resulted in delay in payment of balance of purchase price — Whether vendor could insist that the purchaser comply strictly with the provision as to time*

Contract *— Sale and purchase of land — Time — Strict compliance with sale and purchase agreement — Time was of essence of contract — Contract provided that payment of purchase price must be made within seven days after receipt of order of court by purchaser — Vendor failed to send order of court to purchaser directly as provided in contract — Instead, order was sent to purchaser's solicitors — Such non-compliance resulted in delay in payment of balance of purchase price — Whether vendor could insist that the purchaser comply strictly with the provision as to time*

The appellants ('the purchasers') and the respondents ('the vendors') entered into a sale and purchase agreement dated 28 December 1979 in respect of a piece of land ('the land'). The vendors signed the agreement as administrators of the estate of the registered proprietor of the land. Clause 3 of the agreement provided that the purchaser shall deposit the balance of the purchase price with the solicitors for the vendors ('the vendors' solicitors') within seven days of receipt of an order of court approving the sale of the land. The court order granting leave to sell the land was obtained on 4 November 1982 ('the court order'). On 11 January 1983, the vendors' solicitors sent the court order to the solicitors for the purchasers ('the purchasers' solicitors') which was received on 15 January 1983. On the same day, the purchasers' solicitors sent it on to the purchasers who received it on 19 January 1983. On 24 January 1983, on the instructions of the purchasers, the balance of the purchase price was sent to the vendors' solicitors who received it on 24 January 1983. The vendors' solicitors subsequently wrote to the purchasers' solicitors that the vendors could not accept payment from the purchaser as the purchaser was in breach of cl 3 of the agreement.

The purchasers alleged that neither the vendors nor their solicitors sent the sealed copy of the court order to any of the addresses of the purchasers envisaged in cl 16 of the agreement. The purchasers pleaded that the seven days stipulated in cl 3 of the agreement commenced running from the actual date on which the purchasers received the sealed copy of the order of the court (ie 19 January

1983), thus the balance of the purchase price was paid within time, ie within the seven days' period. A

The court below was of the view that there was a breach of cl 3 of the agreement in view of time being made the essence of contract, because the time of receipt of the order of the court by the purchasers would be the time when it was received by their solicitors on 15 January 1983 and payment of the balance of the purchase price on 24 January 1983 was outside the seven-day period mentioned in cl 3, ie two days late. The purchasers appealed. B

Held, allowing the appeal: C

A court of equity could relieve a purchaser against a failure to comply with a condition as to time in a sale and purchase agreement where circumstances justify it. In the instant case, such circumstances could be found in the conduct of the vendors who sent the court order to the purchasers' solicitors instead of sending it to the purchasers directly at the address stated in the agreement, as clearly indicated by cll 3 and 16. If the vendors were not strict in compliance with cl 3, it would be quite inequitable for them to insist on the purchasers to comply strictly with cl 3. The actual delay in the court order reaching the purchasers was caused by the indirect transmission of it to the purchasers' solicitors and not to the purchasers directly at the address stated in the agreement, notwithstanding the fact that the transmission to the purchasers' solicitors would be imputed to the purchasers as principals because of the correspondence between the parties hitherto being conducted by their respective solicitors. The purchasers and their solicitors had been vigilant in doing their respective parts of sending the order and making the payment respectively, and in no way could their conduct be considered reprehensible (see p 550D–H); *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439 followed. D E F

[Bahasa Malaysia summary

Perayu-perayu ('pembeli') dan penentang-penentang ('penjual') telah mengikat suatu perjanjian jual beli ('perjanjian tersebut') bertarikh 28 Disember 1979 berhubung dengan sebidang tanah ('tanah tersebut'). Penjual menandatangani perjanjian tersebut sebagai pentadbir estet tuan punya berdaftar tanah tersebut. Fasal 3 perjanjian tersebut memperuntukkan bahawa pembeli harus mendeposit baki harga belian dengan peguamcara untuk penjual ('peguamcara penjual') dalam tempoh tujuh hari dari penerimaan suatu perintah mahkamah yang meluluskan jualan itu. Perintah mahkamah yang memberi kebenaran untuk menjual tanah tersebut diperolehi pada 4 November 1982 ('perintah mahkamah'). Pada 11 Januari 1983, peguamcara penjual menghantar perintah mahkamah kepada peguamcara untuk pembeli ('peguamcara pembeli') yang telah diterima pada 15 Januari 1983. Pada hari yang sama, peguamcara pembeli pula G H I

menghantarkannya kepada pembeli yang menerimanya pada 19 Januari 1983. Pada 24 Januari 1983, atas arahan pembeli, baki harga belian telah dihantar kepada peguamcara penjual yang menerimanya pada 24 Januari 1983. Peguamcara penjual selanjutnya menulis kepada peguamcara pembeli bahawa penjual tidak boleh menerima bayaran daripada pembeli kerana pembeli telah melanggar fasal 3 perjanjian tersebut.

Pembeli mengatakan bahawa baik penjual mahupun peguamcara mereka tidak menghantar salinan meterai perintah mahkamah kepada mana-mana alamat pembeli yang dibayangkan dalam fasal 16 perjanjian tersebut. Pembeli berhujah bahawa tempoh tujuh hari yang disyaratkan dalam fasal 3 perjanjian tersebut bermula dari tarikh sebenar apabila pembeli menerima salinan meterai perintah mahkamah (iaitu 19 Januari 1983), maka baki harga belian telah dibayar dalam masa, iaitu dalam tempoh tujuh hari.

Mahkamah bawah berpandangan bahawa terdapat suatu kemungkiran fasal 3 perjanjian tersebut memandangkan masa dijadikan intipati kontrak, sebab masa penerimaan perintah mahkamah oleh pembeli merupakan masa apabila ia diterima oleh peguamcara mereka pada 15 Januari 1983 dan bayaran baki harga belian pada 24 Januari 1983 adalah di luar tempoh tujuh hari yang disebut dalam fasal 3, iaitu lewat dua hari. Pembeli membuat rayuan.

Diputuskan, membenarkan rayuan:

Sebuah mahkamah ekuiti boleh memberikan bantuan kepada seseorang pembeli terhadap kegagalan untuk mematuhi syarat ke atas masa dalam suatu perjanjian jual beli di mana keadaan memberikan justifikasi kepadanya. Dalam kes ini, keadaan demikian boleh didapati dalam kelakuan penjual yang menghantar perintah mahkamah kepada peguamcara pembeli dan bukan menghantarnya kepada pembeli secara terus di alamat yang dinyatakan dalam perjanjian tersebut, seperti yang ditunjukkan dengan jelas oleh fasal-fasal 3 dan 16. Jika penjual tidak mematuhi fasal 3 dengan ketat, adalah tidak saksama untuk mereka mendesak pembeli supaya mematuhi fasal 3 dengan ketat. Kelewatan sebenar dalam penyampaian perintah mahkamah kepada pembeli disebabkan oleh penghantaran secara tidak langsung kepada peguamcara pembeli dan bukan kepada pembeli secara terus di alamat yang dinyatakan dalam perjanjian tersebut, meskipun fakta bahawa penghantaran kepada peguamcara pembeli akan dikatakan disebabkan oleh pembeli sebagai prinsipal kerana surat-menyurat antara pihak-pihak sehingga ini dilakukan oleh peguamcara masing-masing. Pembeli dan peguamcara mereka telah mengambil langkah berjaga-jaga dalam melakukan bahagian mereka masing-masing dalam menghantar perintah dan membuat bayaran masing-masing, dan kelakuan mereka tidak boleh dikatakan patut dicela dalam apa cara pun (lihat ms 550D–H); *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439 diikut.]

Notes

For cases on sale and purchase of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2435–2819; 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2063–22136.

Case referred to

Hughes v Metropolitan Rly Co (1877) 2 App Cas 439 (folld)

Appeal from: Civil Suit No F 125 of 1983 (High Court, Kuala Lumpur)

RR Sethu (*Yap Bell Pung* with him) (*Bell & Lee*) for the appellants.
BE Teh (*Teh & Associates*) for the respondents.

Peh Swee Chin FC J (delivering the judgment of the court): We have earlier allowed the appeal of the appellants, setting aside the order of the court below dated 28 December 1993 and granting specific performance with consequential directions, with costs here and below. We indicated that we would give our grounds of judgment and we hereby do so now.

The appellants ('the purchasers') and the respondents ('the vendors') entered into a sale and purchase agreement dated 28 December 1979 in respect of a piece of land, and relevant for the purpose of this appeal are cll 3, 11 and 16 thereof which are set out below:

> 3 The purchaser shall deposit the balance of the purchase price amounting to Ringgit Malaysia eighty-six thousand two hundred and fifty six (RM86,256) with the vendors' solicitors Dr Stephen Goh & Partners, Advocates & Solicitors of 6th Floor, Pudu Building, Pudu Road, Kuala Lumpur as stakeholders ('the vendors' solicitors') within seven days of receipt of the order of court approving the sale of the said land.
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> 11 Time wherever mentioned shall be deemed to be of the essence of this agreement.
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> 16 Any notices required to be given under the provisions of this agreement shall be deemed to have been sufficiently served on the other party if such notice is left at the usual or last known place of residence or at the address abovestated or sent by registered letter to any such address and in the last mentioned case the service shall be deemed to be effected at the time when the registered letter would in the ordinary course of post be delivered.

With reference to the 'order of court' approving the sale of the land as mentioned in cl 3, it is to be noted that the vendors signed the said agreement as administrators of the estate of the registered proprietor of the land ('the deceased').

A The statement of claim of the purchasers sets out the material facts of this case which we will mention or summarize later. It also refers to cll 3, 11 and 16 of the said agreement set out above, in particular, by para 4(i) of the statement of claim, it states:

> 4(i) The address of the plaintiffs was stated in the long title of the said B agreement as 'No 2, Jalan Merak, Off Jalan Ipoh, Kuala Lumpur'. That address was the address referred to as 'the address abovestated' in the said cl 16 as the address of the plaintiffs.

In this connection, para 15 would be relevant and is set out below:

> Neither the defendants nor their solicitors sent the sealed copy of the said C court order dated 4 November 1982 to any of the addresses of the plaintiffs envisaged in cl 16 of the said agreement dated 28 December 1979. If time had continued to be of the essence of the agreement contrary to the denial thereof in para 14 above, the plaintiffs plead that the seven days stipulated in cl 3 of the said agreement commenced running from the actual date on which the plaintiffs received the said sealed copy of the order of the court. D The plaintiffs actually received the sealed copy of the said order of the court on 19 January 1983. There was no variation of the said cl 16. No antecedent authority was conferred by the plaintiffs on Sykt Tan Ah Lak either: (a) to receive the court order so as to vary cll 16 or 3 of the said agreement so as to make a receipt of the court order by M/s Tan Ah Lak into a simultaneous receipt by the plaintiffs of the court order; or (b) to receive the court order.

E We now set out the material and undisputed facts. A deposit or earnest money was paid and by cl 3 aforesaid, the balance of the purchase price in the sum of RM97,038 (increased apparently by consent of both parties from RM86,256 mentioned in the same cl 3) was to be paid 'within seven days of receipt of the order of court approving the sale of the land', bearing F in mind that time would be of the essence in this connection.

The said agreement was signed on 28 December 1979 and the court order granting leave to sell the said land was obtained on 4 November 1982. By this time, the vendors had changed their solicitors, and the new solicitors were M/s Cheang Lee & Ong of Ipoh in place of Dr Stephen Goh G & Partners, Kuala Lumpur.

M/s Cheang Lee & Ong sent, on 11 January 1983, the order of the court dated 14 November 1982 to M/s Tan Ah Lak, solicitors for the purchasers and M/s Tan Ah Lak received it on 15 January 1983. On the same day they received the court order, M/s Tan Ah Lak sent it on to the purchasers who received it on 19 January 1983.

H On the instructions of the purchasers, M/s Tan Ah Lak sent the balance of the purchase price on 24 January 1983, by hand, this time, to M/s Cheang Lee & Ong who received it with the covering letter on 24 January 1983.

By letter dated 31 January 1983, M/s Cheang Lee & Ong wrote to M/s I Tan Ah Lak as follows:

> We regret to inform you that our client cannot now accept payment from your client as your client is in breach of cl 3 of the sale and purchase agreement. In the circumstances, we hereby enclose the cheque.

The court below was of the view that there was a breach of cl 3 of the sale and purchase agreement in view of time being made the essence of contract, because the time of receipt of the order of the court by the purchasers would be time when it was received by their solicitors, viz M/s Tan Ah Lak on 15 January 1983 and payment of the balance of the purchase price on 24 January 1983 was outside the seven day's period mentioned in the said cl 3, ie two days late.

It was the contention of the purchasers that they actually received the court order on 19 January 1983, and therefore they paid on 24 January 1983, the balance of the purchase price within time, ie within the seven days' period. This contention was rejected by the learned trial judge.

A court of equity can grant relief against forfeiture when circumstances justify it. Similarly by extension of this rule, in an action for specific performance, for a purchaser who comes to court with clean hands, a court of equity can relieve the purchaser against a failure to comply with such a condition as to time in sale and purchase agreement where circumstances justify it. In the instant case, such circumstances could be found in the conduct of the vendors who sent the court order in question to M/s Tan Ah Lak instead of sending it to the purchasers directly at the address stated in the sale and purchase agreement, as clearly indicated by cll 3 and 16. If the vendors were not strict in compliance with cl 3, it would be quite inequitable for them to insist on the purchasers to comply strictly as to time with cl 3. The actual delay in sending the balance of the purchase price correspond to more or less, or was caused by the actual delay in the court order reaching the purchasers. The actual delay in the court order reaching the purchasers was caused by the indirect transmission of it to the purchasers' solicitors and not to the purchasers directly at the address stated in the sale and purchase agreement, notwithstanding the fact that the transmission to the purchasers' solicitors would be imputed to the purchasers as principals because of the correspondence between the parties hitherto being conducted by their respective solicitors. The purchasers and their solicitors had been vigilant in doing their respective parts of sending the order and making the payment respectively, and in no way could their conduct be considered reprehensible. See *Hughes v Metropolitan Rly Co* (1877) 2 AC 439.

We find an echo in a relevant passage in *Cheshire, Fifoot & Furmston's Law of Contract* (11th Ed) by Prof Furmston at p 609 as set out below:

> It is clear at least that equity, where warranted by the circumstances, will relieve the buyer to the extent of giving him further time within which to complete the contract, even though the parties have agreed that time shall be essential. In other words, the forfeiture will be suspended, provided that the buyer expresses himself ready and willing to pay the balance of the price within the extended time fixed by the court.

A The court was of the view that relief should be granted to the purchasers against the forfeiture of their bargain for their failure to comply with cl 3 as to time by allowing the purchasers to pay the said balance of the purchase price late by two days as they had done.

We therefore allowed the appeal as stated above.

B *Appeal allowed.*

Reported by Loo Lai Mee

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